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IN THE

Supreme Court of the United States

No. 74-1464

PERRY L. EDGE, Administrator
of Estate of Bozzie L. Edge, dec.,

Petitioner,

v.

UNION MEDICAL CENTER, INC.,
a corporation.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I.

Petitioner, Perry L. Edge, petitions this Court for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

II.

OPINIONS BELOW

The Judgment and Memorandum of the United States Court of Appeals for the District of Columbia Circuit is printed in the Appendix to this Petition, pages 1a through 4a.

III.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was dated and entered on December 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1234 (1).

IV.

QUESTIONS PRESENTED

1. Whether the affirmation by the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment and order of the United States District Court, on the basis of its inconsistency with previous judicial interpretations on damages under the District of Columbia Wrongful Death and Survival Statutes in the Courts of the District of Columbia, was violative of the Sixth Amendment Right to a Fair Trial?

2. Whether, under the Survival Statute, awarding damages only for the monies remaining after the appellant's decedent's projected maintenance costs are substracted from his future probable earnings constitutes a violation of equal protection of the laws by its discriminatory effect on the appellant's decedent, too impoverished to earn such a residual amount?

V.

STATUTES INVOLVED

1. 12 D.C. Code, 101, 1967 ed.
2. 16 D.C. Code, 2701, 1967 ed.
3. See Appellant Brief, Joint Index #1.

VI.

STATEMENT OF THE CASE

Appellant, the Administrator of the Estate of Bozzie L. Edge, his deceased brother, originally brought this action in the United States District Court of the District of Columbia. Under the initial cause of action, damages were sought under the Wrongful Death Statute. The Court later granted Appellant-Plaintiffs' Motion for leave to amend the complaint, allowing the Survival Statute as an additional cause of action.

At the conclusion of the Plaintiffs' case, the Court denied Defendant's request for Directed Verdict on Wrongful Death Statute, but granted the motion on the Survival Statute.

The remaining cause of action, after subsequent evidence was proferred, was presented to the jury. To the cause, the jury found in the Defendant's favor.

The United States Court of Appeals for the District of Columbia affirmed the Verdict of the jury from the District Court. The Appeals Court failed to address the issues pertaining to the Survival Statute that were appealed upon, stating that the ultimate jury determination of nonliability of the defendant on the Wrongful Death Statute undercuts any appealable error the District Court might have made concerning the Survival Statute.

VII.

STATEMENT OF FACTS

The decedent, Bozzie L. Edge, age 43 years of age, born April 16, 1926, was unmarried and did not support nor did he have minor children. There were no other persons dependent upon the decedent for support. The decedent was a construction worker-laborer and had been so employed with the A.J. Ellis Corporation Company for a period of fourteen years. On the date of his death, decedent was earning approximating $3.30 per hour.

The Appellee is a non-profit corporation operating as a medical clinic in the District of Columbia. The clinic exists for the treatment of various diseases and illnesses of persons seeking such treatment at the clinic. The clinic operates under the name of Union Medical Center, Incorporated. The clinic maintains a supply of

various antibiotics which includes Wycillin, an acqueous suspension, stabilized, with sodium citrate buffer. Wycillin is classified, generically, as a procaine penicillin G suspension and is manufactured by Wyeth Laboratories, Inc. of Radnor, Pennsylvania. Wyeth Laboratories includes in each package of Wycillin, an insert which clearly describes the drug, Wycillin, it's warnings and precautions and adverse reactions. In it's package insert, Wyeth clearly spells out under "Warnings" the following language:

> "... In rare instances the injection of penicillin G may cause acute anaphylaxis which may prove fatal unless promptly controlled. This type of reaction appears more frequently in patients with previous sensitivity reactions to penicillin, and those with bronchial asthma or other allegies."

The decedent, Bozzie L. Edge, was no stranger to Union Medical Clinic. The decedent first contacted the Clinic on November 19, 1959 for treatment of an eye injury. On June 28, 29 and 30, 1961, the decedent was again seen at the Clinic and was treated for laceration of the left wrist. Decedent appeared at the Clinic again on June 4 and 12, 1962 and again on August 16, 1965 for treatment of a Urethral discharge. During the visit, August 16, 1965 decedent was administered 600,000 units of penicillin. The next clinical contact was January 25, 1967 at which time decedent was administered Tetracycline. On February 17, 1967, decedent was again appeared at the Clinic for treatment of Acute Tonsillitis and Cough. Pentids #20 were prescribed. On September 25 & 27, 1968. decedent again appeared at the Clinic for treatment for injury of his heel. On February 10, 1969, the decedent was seen at the Clinic for treatment and was administered Tetracycline.

On September 30, 1969, the decedent returned to the Clinic for treatment of tonsillitis and enlarged infected tonsils, as well as cold. He was examined by a Dr. Charles Trotman, an employee of the Clinic. The physical examination revealed that both tonsils were enlarged and infected. Dr. Trotman prescribed 600,000 units of Wycillin about 5:45 P.M. All patients who receive penicillin are instructed to wait for a period of 15 minutes and to report any reaction to the nurses or the doctors. Mr. Edge was told to wait, as he had done on previous occasions after having taken penicillin. At about 6:00 P.M., decedent was called by Mrs. Sallie Welch, a Licensed Practical Nurse employed at the Clinic and who administered the 600,000 units of Wycillin, but did not answer. Attempts were allegedly made to find the decedent. At approximately 6:45 P.M., one hour after decedent had been administered the 600,000 units of Wycillin, and by chance, decedent was found in the bathroom (men's) of the Clinic by a Mr. Leroy Johnson, also a patient of the Clinic. When found, the decedent was on his knees, his face and head in the commode. Dr. Trotman was called to the scene immediately. Having found no vital signs, Dr. Trotman pronounced the decedent dead.

The decedent's body was thereafter transferred to the District of Columbia Morgue where an Autopsy was performed the following day, October 1, 1969. The Autopsy revealed that the decedent had died from causes listed as:

> "Pulmonary Edema and Congestion, Probable Penicillin Reaction, Acute & Chronic Bronchitis."

The Appellant thereafter filed a civil action seeking damages due to wrongful death and having later

amended his complaint, sought damages under the Survival Statute of the District of Columbia.

VIII.

REASONS FOR GRANTING THE WRIT

There is still much confusion surrounding the rights of Administrators and relations of a decedent concerning the allowance and/or measurement of damages in actions involving violation of the District of Columbia Wrongful Death and Survival Statutes, especially in actions where violations of these statutes are alleged in the same action. This confusion apparent in the District Court's misinterpretation in the present case as compared to previous cases in the District of Columbia has resulted in a violation appellant's right to a fair trial.

The Wrongful Death Statute, 16 D.C. Code 2701, 1967 ed. and the Survival Statute, 12 D.C. 101, 1967 ed. are mutually exclusive statutes, and entitle the personal representative of the estate of the deceased to seek damages under both statutes, *Sornborger v. District Dental Laboratories, Inc.*, 105 U.S. App. D.C. 290, 266 F.2d 694 (1959). The rationale for allowing this multiple recovery is that the statutes constitute two separate compensible interests, for two separate classes of representatives of the deceased appellant, who are seeking distinctly separate forms of damages. The Wrongful Death Statute creates a cause of action for relations who were dependant for some measure of their maintenance support on the decedent. The Survival Statute creates a cause of action for the

administrators of decedent's estate to recover the damages and losses resulting from Defendant's tortious Act. From this estate both heirs and creditors of the decedent are compensated. Because of the distinct and separate motion of the causes of action, juries can assign liability and award damages under the Survival Statute, but not under the Wrongful Death Statute. If there had been no relations dependant for support on decedent, there would have been no pecuniary loss to anyone and consequently no liability or damages would be imposable for the decedent's death and future inability to supply support. There would be a loss to the Decedent's estate, however. This loss, defined by the Survival Statute, is to be the same loss as that which the decedent would have been entitled to litigate and recover for had he lived. The loss is explained in *Hudson v. Lazarus*, 217 F.2d 344, 348, which stated;

> "Permanent loss of earnings power is usually the chief economic harm caused by a personal injury. If Hudson in his lifetime had recovered judgment in this action, his damages would have included an allowance for prospective loss of earnings during his normal life expectancy, discounted to present worth, and with such other adjustments as the facts may require. When he died his right to these damages passed under the Survival Act to his Administrator, the present appellant. . . ."

The distinction between recovery under the Wrongful Death Statute and recovery under the Survival Statute is further delineated in a later case, *Runyon v. District of Columbia*, 463 F.2d 1319, 1323, which stated;

> "Nothing in the evidence indicates that the estate or the widow and children recovered twice for the same compensible interest. The jury was

> authorized by the instructions to award pecuniary loss under both the Survival Statute and the Wrongful Death Act. The pecuniary loss to an estate however, does not coincide with the pecuniary loss to those entitled to recover under the Wrongful Death Act."

The formulas for calculating compensible damages under the Survival Statute are conflicting in *Hudson*, supra and *Runyon*, supra. In *Runyon*, supra, as opposed to *Hudson*, supra, the future probable maintenance costs of decedent (had he lived) are subtracted from the gross future probable earnings to determine the measure of compensible damage. Given this contradiction, it still is a controversy that relates only to the measurement of damages after the imposition of liability has occurred. In the District Court's grant of directed verdict as to the liability and recovery under the Survival Statute, and in the Appeals Court affirming this decision, the distinction between liability and subsequent award of damages has been ignored. By deciding that a jury's decision of nonliability as to the Wrongful Death Statute contradicts any claim of mistake concerning the grant of Directed Verdict on the Survival Statute at the District Court level, the Appeals court of obfuscate and ignores the dictates of prior case law. Had the trial court instead allowed the jury to decide on the liability of Defendant under the Survival Statute, this would have been an entirely distinct deliberation than that of deciding whether there was pecuniary loss to Decedent's relations for their own maintenance support under the Wrongful Death Statute. The compensible damages under the Survival Statute would have been those rights the decedent would have had against the defendant for those losses sustained and caused by the Tortious Act.

These rights and their fair adjudication were denied by the Appeals Court affirmation of the case. The result has been to contradict the dictates of prior case law and to defeat the intent of the Survival Statute legislations that the rights of a decedent be transferred to the Administrator of his estate.

If the formula for recoverable damages under the District of Columbia Survival Statute postulated in *Runyon v. District of Columbia*, supra, is controlling. This constitutes a violation of equal protection of the laws. It is violative because it denies only those too poor to contruct an estate the right to recover upon their death where there would have been allowable recovery had they lived. The formula is violative because of its discriminatory nature towards those of a classification relations to wealth and because there would be no appreciate state reward or interest in accepting this formula. It seems that accepting the formula in *Runyon*, supra, would be contrary to the legislative intent can actions of a decedent to survive and be transferred to his administrator upon Decedent's death.

> The formula as stated in *Runyon*, states; "customerily the probable earnings of deceased had he lived is proved by using actuarial tables based upon large segments of a particular population, together with evidence of the deceased earnings history. Gross probable future earnings ordinarily approximate his project average annual income multiplied by the number of years of his life or work expectancy. From this gross amount is subtracted probable income tax both state and local for the term of the probable work life and the amount the deceased would have required to maintain himself and contribute to those entitled to recover under the Wrongful Death Statute."

The phrase which contradicts the formula postulated in *Hudson*, and creates and discriminates against a class of people is the requirement for the subtraction of maintenance costs from gross probable earnings. This formula has the effect of denying any recovery under the Survival statute to the estates of decedent's who, when killed as a result of the tortious Act of Defendant, were earning no more than it took to maintain themselves. The stated purpose of the Survival Act is to allow any rights or actions the decedent may have had against the defendant for reason to pass to his estate's administrator. The decedent had he lived and been incapacitated as a result of the tortious act, would have an action against the defendant for all probable future earnings or maintenance costs. This action would be available regardless of the decedent's economic status. The recoverable damages would be at least for probable future earnings multiplied by the remaining work years. According to the *Runyon* formula, however, the death of decedent would allow for only those estates to recover where the decedent earned greater than the Amount that would be required for his maintenance had he lived. An appropriate quote from *Prosser on Torts*, 1 ed., p. 901, comments on the disagreeable nature of this discrimination;

> "There has been some dispute as to the desirability of broad survival statutes. Opposition to them is based upon the argument that justice does not require a windfall to the plaintiff's heirs by way of compensation for an injury to him when they have suffered none of their own. The modern trend is definitely toward the view that tort causes of action and liabilities are as fairly a part of the estate of either plaintiff or defendant

> as contract debts and that the question is rather one of why a tortuitous event such as death should extinquish a valid action."

In determining whether the *Runyon*, supra, formula requirements would create and discriminate against a classification forbidden by the Equal Protection Mandate of the Constitution, the words historically inspect, the character of the classification, the individual interest asserted in favor of the classification, and the governmental interests in favor of the classification.

In the case before the court, the formula used for calculating recoverable damages under the Survival Statute denies recovery to those persons earning less than on equal to the amount required to maintain themselves. This would seem to restrict recovery according to an absolute measurement of wealth. A classification deemed suspect and to be subjected to class judicial scrutiny by the court. *Griffith v. Illinois*, 351 U.S. 12 (1956). When the scrutiny of the court focuses on whether and what degree of governmental interests there could be in accepting the *Runyon* formula, it seems an empty quest. The legislative intent of the Survival Statute is to facilitate actions allowed the living decedent to survive and be used by decedent's administrator. That the legislature would intend for this survival of actions to apply only to the wealthy seems impossible. It is impossible because differentiating the allowability of recurring damages on the basis of the *Runyon* formula would not seem an effective means for implementing the legislative intent in the Survival Statute. The *Runyon* formula certainly does not seem to implement the intent of the legislature in accordance with the equal Protection mandates.

XIX.

CONCLUSIONS

For the foregoing reasons, Petitioner respectfully requests that its petition for Writ of Certiorari to review the Decision of the United States Court of Appeals for the District of Columbia be granted; That an Order to that effect be entered, and the Court below and the counsel be notified of the granting of the Petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1544 September Term, 1973

Civil 2645-70

Perry L. Edge,
Administrator of the Estate of
Bozzie L. Edge, deceased, Appellant

v.

Union Medical Center, Inc.
a corporation

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: Tamm, McGowan and Leventhal, Circuit Judges

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this

cause is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court
Hugh E. Kline, Clerk

/s/ Robert A. Bonner
By: Robert A. Bonner,
Chief Deputy Clerk

(stamp)
United States Court of Appeals
for the District of Columbia Circuit
Filed Dec 6 1973
Hugh E. Kline
clerk

No. 72-1544 – Edge v. Union Medical Center

MEMORANDUM

For the most part, the brief filed in behalf of appellant Perry L. Edge, administrator of the estate of his deceased brother, Bozzie L. Edge, is directed to alleged errors of the trial court in connection with appellant's case under the Survival Statute, D.C. Code §12-101, raising questions as to whether a cause of action exists under that act, failure to instruct the jury properly on damages, error in directing a verdict in defendant's favor on the issue of damages, etc.

This court is of the view that all such questions can be put to one side, because the trial court did submit the plaintiff's case to the jury on the claim under the Wrongful Death Act, D.C. Code §16-2701, denying defendant's motion for a directed verdict and giving plaintiff the benefit of the doubt. If there was a claim under such act, concededly funeral expenses were recoverable. The court overruled defendant's motion for a direct verdict, while saying that in his view plaintiff had "a very weak case." The jury's verdict for defendant, and conclusion that there was no negligence, effectively undercuts any action under both acts.

Defendant was clearly entitled to go to the jury on its theory that it was not negligent. The deceased suffered from anaphylactic shock after having been given an injection of 600,000 units of penicillin. The manufacturer's brochure had a caution against intravenous administration, but here the injection was intramuscular. There was a caution concerning sensitivity, and advice to make due inquiry, but defendant's undisputed evidence is that Mr. Edge was questioned prior to the injection regarding symptoms of a possible allergy, and he replied in the negative. Plaintiff's witness, Dr. Small, testified that in the community penicillin is rarely used by injection, unless given intravenously in large doses for an illness like subacute bacterial endocarditis; that for the past four or five years most physicians have avoided the use of intramuscular penicillin, because of the increasing incidence of reactions; that penicillin as a tablet is frequently given for tonsillitis. Nevertheless, Dr. Small when asked specifically whether he had an opinion as to whether the care and treatment of the decedent met the standard of care in the area, failed either to answer

that question, or to assert that it did not meet that standard of care. There was unrebutted testimony that the decedent's acute tonsillitis, infected and enlarged tonsils and 102 degree temperature, was considered serious. In view of the lack of specific testimony that the injection for this condition violated the community's standard, we have no basis for overturning the verdict.

We are not insensible to the possibility that the jury's verdict on liability may have been affected by matters going more properly to damages, that the deceased had accumulated no assets when he died at 43, that when he died he was unmarried and without dependents. But we cannot say that the verdict in defendant's favor was without legal support, or represents such shocking injustice that it cannot be permitted to stand.

Affirmed.

SUPREME COURT, U. S. FILED
JUN 10 1975
MICHAEL RODAK, JR., CLERK

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was filed and entered on December 6, 1973. A subsequent suggestion for rehearing was denied on February 11, 1974. The petition for writ of certiorari was filed with this Court on May 21, 1975. Said petition

was clearly not filed within the 90-day time period set forth in 28 U.S.C. 2101(c) (1949). The Court, therefore, does not have jurisdiction to entertain the petition even if the Court would otherwise have jurisdiction under 28 U.S.C. 1254(1) (1970).

STATUTE INVOLVED

Title 28, Section 2101(c) of the United States Code provides:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." June 25, 1948, c. 646, 62 Stat. 961; as Amended May 24, 1949, c. 139, § 106, 63 Stat. 104.

COUNTERSTATEMENT OF THE CASE

The judgment of the United States Court of Appeals for the District of Columbia was filed in the case herein on December 6, 1973. On January 2, 1974, the appellant below filed motion for leave to file petition for rehearing en banc. On January 11, 1974, appellee filed motion in opposition to leave to file petition for rehearing en banc. A per curiam order of the Court of Appeals, dated January 30, 1974, directed the clerk to file appellant's petition for rehearing en banc as a suggestion for rehearing en banc. Appellant's suggestion for rehearing en banc was then filed on January 30,

1974. A letter dated February 11, 1974, was sent by the Court of Appeals to appellant's counsel. It stated that no judge had requested a vote on the suggestion for rehearing en banc and that no action would be taken on said petition. There is no indication that the Court of Appeals was prepared to take any further action on the suggestion for rehearing.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A review of the procedural aspects of the case at bar clearly shows that petitioner filed his petition for writ of certiorari outside the 90 day statutory period set forth in 28 U.S.C. 2101(c) (1949). While it is true that petitioner, appellant below, filed motion for leave to file petition for rehearing en banc, this does not help his cause. A timely petition for rehearing tolls the running of the time within which to apply for writ of certiorari. Petitioner, however, received a letter from the Court of Appeals dated February 11, 1974, stating that no further action would be taken on the judgment filed and entered on December 6, 1973.

Under circumstances most favorable to petitioner, he could have filed the petition for writ of certiorari until July 11, 1974. The suggestion for rehearing was denied on February 11, 1974, commencing the 90-day time period set forth in the statute. *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942). Assuming, *arguendo*, that final entry of judgment occurred on February 11, 1974, would help petitioner not at all. Nor did petitioner ever file for a 60-day extension as permitted under 28 U.S.C. 2101(c) (1949).

Petitioner alleges no unusual circumstances, indeed no circumstances at all, which would toll the running of the statute.

The significance of the jurisdictional problem is not grasped by petitioner and he addresses the issue with what is at best a typographical error.

It is submitted that the judgment of December 6, 1973, was a final judgment of the Court of Appeals; that said Court's denial of petitioner's suggestion for rehearing en banc tolled the time period set forth in 28 U.S.C. 2101(c) (1949) until February 11, 1974, at the latest; that the petition for writ of certiorari filed May 21, 1975, is untimely, and that, accordingly, the petition should be denied. *Territo v. United States,* 358 U.S. 279 (1959).

CONCLUSION

For the foregoing reason, it is respectfully submitted that the Court does not have jurisdiction to entertain the petition. Therefore the petition for writ of certiorari should be denied as untimely filed.

Respectfully submitted,

DONAHUE & EHRMANTRAUT

By _____

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Attorney for Respondent